NO. 1564.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ELIZABETH DECKER, *Appellant*,

vs.

PACIFIC COAST STEAMSHIP COMPANY,
a corporation, *Appellee*.

APPELLANT'S REPLY BRIEF

E. M. BARNES,
Attorney for Appellant.

Filed this ..... day of June, A. D. 1908.

Clerk.

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Oregon passed a law recognizing such sales, thus making it possible for such severance. An early Oregon decision, and on which subsequent decisions are based, gives that as the reason why such severance is there permitted.

"We are aware that it is a general rule that what is appurtenant to land passes with it, being an incorporeal hereditament, but the right to build a wharf on the land of the state below high water is a franchise which attaches to the tide land, and it is appurtenant to it rather than to the adjacent land, for it can be severed from the adjacent land and enjoyed without it. The legislature has established the right of the adjacent owners to sell the right of wharfing on the adjacent tide lands, by recognizing such sales and giving the owners thereof the preference to purchase."

Parker vs. Rogers, 8 Ore. 190.

If under the common law there could be a severance there would have been no necessity for the legislature of Oregon to so establish the right, and until congress so establishes such right in Alaska there can be no severance.

The citation cited by appellee on p. 8 of its brief, 24 *American and Eng. Enc. of Law* (2d ed.), p. 982, is to the point that the grant was good against the proprietor, but in the case at bar there was no littoral proprietor. And this Court takes judicial knowledge that the United States was the owner of the bed of water.

It strikes appellant that a crucial test as to whether

the littoral right can be severed from the land is:

Can it be sold under execution separate and apart from the land?

"So if a settler upon the public lands under the homestead law constructs a ditch for the purpose of conveying water onto his land for irrigation purposes such ditches and water rights become part of the realty and are not several therefrom, and are exempt from execution."

Faulk vs. Cook, 19 Ore., 455.

Appellant does not lose sight of the doctrine in 8th Ore., cited past, but that was made in pursuance to a statute of Oregon. This 19th Ore. is the judgment of the court unhampered by statute. In Alaska there was no such statute as governed the decision in 8th Ore., and the 19th Ore. is applicable to littoral rights in Alaska and the case at bar.

"The water rights pass appurtenant to the land."

Geddish vs. Parrish, 21 P. 314 (Wash.).

"The sale of the mill and transfer of the possession right to the land passes the water right to the vendee."

McDonald vs. Bear River Co., 13 Cal. 220.

Appellant acquired no title to Block L by the act of settlement, but only the right to one on her complying with the provisions of the law governing the sale and disposition of the lots of the City of Juneau. She had no title at the time of the deed to People's Wharf Co., February 20, 1897.

"When such a settler appropriates water for the necessary irrigation of the land occupied by him it

becomes as much a part of his improvements as his buildings or fences, and can be sold and transferred with his possessory right in the same way.

The principal subject matter of such a sale and purchase is the possessory right to the land and the consequent preference over others in the purchase of such land from the government. The water right being a necessary incident to the complete enjoyment of the land * * *

Hindman vs. Rizor, 21 Ore. 117.

The water right is appropriated by observing certain formalities of law, not necessary here to discuss.

The right to wharf out is a legal right dependent solely on littoral proprietorship, no act being necessary.

Appellant on becoming the littoral proprietor, unhampered by statute as in Oregon, had the same rights as had the settler in *Hindman vs. Rizor*, supra.

The condition at the time appellant's deed to the People's Wharf Company was that Franklin street intervened between Block L and the shores of Gastineau Channel.

"The parties are presumed to contract in reference to the condition of the property at the time of the sale, and neither has a right, by altering arrangements then openly existing to change materially the relative value of the respective parts."

Fremont E. & N. Valley R. Co. vs. Fayton, 67 Neb. 263, 93 N. W. 163.

Neither the People's Wharf Co. or any of its grantees can now claim more or different from what

is conveyed in the deed dated February 20, 1897.

"A reservation in a deed of upland along a tidal river of the water rights, privileges and grants appertaining to the land conveyed is ineffectual to reserve such rights if no grant to the land under the water has been obtained from the state."

Farnham, Vol. III, p. 2197.

The converse of the rule must be true, i. e. No grant of the water rights can be made if no grant to the land under the water had been obtained, hence the title to the land under the water being in the United States no rights were obtained by the People's Wharf Company in deed of February 20, 1907, and none passed from them, and neither appellee nor its lessor or its lessor's grantor have any now or ever had any.

An examination of all the authorities on the "separation of riparian right from upland" as cited by Farnham all turn on the proposition "of such a separation conferring the ownership of the dater, so far as it ca nrest in an individual, upon the one who owns the bed of the stream."

Farnham, Vol. III., p. 724, and authorities.

As so often said herein, there is no ownership to the bed of this water.

Referring to the italics in lines 4 and 5, p. 9 of appellee's brief and particularly to the stars therein on p. 5, appellant will supply the part indicated by the stars in said line 5, "*as laid off and platted by G. W. Garside and we do, as such owners of said lots K and L, the same abutting on Franklin street in*

said city, the said street running along the line of ordinary high tide being the shore of said Gastineau Channel in said town of Juneau, and we do as such owners grant to the said party of the second part and forever quit claim to them all littoral and riparian rights appurtenant thereto if any that we may now have or that may hereafter exist for any cause whatsoever in our favor, our heirs, administrators or assigns."

Record, p. 56, lines 3 to 13.

If the grantors intended to convey littoral rights why did they qualify the grant by saying "if any that we may now have?"

Appellant contends that if anything, the deed shows clearly a quit claim to littoral rights not then in existence.

In sub. IV., p. 10, of appellee's brief all appellee claims is that appellant granted to some one and his or its successors and assigns a perpetual right to construct and maintain the wharf.

Eliminating appellant's claims and looking only to appellee's claims we find the only right they claim is "the right to wharf out from our (appellant's) said premises southwesterly to deep water and maintain wharves and warehouses thereon for the benefit of commerce and to own, possess and occupy the same forever by itself and its successors and assigns."

Appellee's Brief, p. 9.

Nothing was granted by this deed, appellant had not the right to wharf out, Franklin street intervened.

Deed, Deckers to People's Wharf Co. Record, p. 56.

Map. Record, p. 68.

The grantees could not own the same, as in Alaska tide lands are not the subject of ownership.

Hampton vs. Columbia Canning Co., supra.

Hence the People's Wharf Co. bought nothing and they have no complaint for they only paid one dollar consideration.

Record, p. 55, line 14.

Appellant's grantee granted no littoral rights to the premises described in the complaint, Block L (Allegation III., Record, p. 3), for in the deed it says:

"For a more particular illustration of the foregoing description reference is hereby made to the map or plat of the said premises which is hereto attached and made a part of this description and marked 'A.' "

Record, p. 65.

Turning to that map we find not only Franklin street, but several buildings between Block L and any possible water on the map or anything to indicate water in front of Block L, for some distance, the map having no scale, and it's appellee's map, appellant objected to its introduction (Record, p. 63). The exact distance to the "float ferry" (that being the first indication of water) cannot be given. The Pacific Coast Co. purchased no littoral right appurtenant to Block L. It purchased from the grantee of People's Wharf Co. (Record, pp. 69-78) and could purchase no more than its grantors had, thus falls appellee's claim that it is the Pacific Coast Company's property that will be destroyed (Appellee's

Brief, p. 5).

On p. 3 appellee urges the fact that The Pacific Coast Company has expended large sums on structures.

Appellant respectfully refers to her brief, p. 12: The Pacific Coast Company cannot complain as it bought only a quit claim right.

Record, pp. 69 and 70.

Appellee in its brief, pp. 7 and 8, says: "How, then, can she be heard to claim that what she expressly authorized to be constructed and maintained is to her a private nuisance?"

Can this Honorable Court, even by casting aside all appellant urges in her briefs, and relying solely upon appellee's brief, find that appellant ever authorized any stores or shops to be erected?

Appellee says such were erected (Allegation II., Record, p. 12).

On p. 11 of its brief appellee says: "And that the trustee deed, under that entry was made to appellant and her husband on October 13, 1893."

Continuing it says, on p. 11: "Whatever littoral rights are now attached to those lands were therefore so attached on the last mentioned date (October 13, 1893) and were therefore all conveyed by the deed to People's Wharf Company (Trans., p. 55) of date February 20, 1897; for there is nothing here to show any after acquired rights."

It is indeed a disagreeable duty to call the court's attention to wrong information given the court of a material fact by opposing counsel, which statement

if unchallenged might cause a decision in favor of the counsel making the same.

The date of the trustees deed, stated by counsel as being dated ~~February 20, 1897~~ Oct 13 1893, is dated October 1, 1898.

Record, pp. 44-46.

Many months after the deed to People's Wharf Co. on February 20, 1897.

Appellant is a widow battling against corporations for what she deems are her rights, she has an abiding faith that this Honorable Court will compel the appellee to fight fairly.

Appellee says, on p. 11: "Appellant's contention is therefore * * * * * *felo de se.*" The presumption is his typewriter made a mistake.

On p. 12 of appellee's brief, at lines 11 and 12 thereof, appellee professes to quote the following language from appellant's brief: "and against which premises the tide regularly at mean high tide ebbs and flows twice in twenty-four hours."

To appellant this seems fudging for the language used in appellant's brief on p. 11 is "and against which premises the tide regularly ebbs and flows twice in twenty-four hours."

According to the pleadings, when did these premises commence to abut on the waters of Gastineau Channel?

The day this complaint was filed.

Allegation IV., Record, p. 3.

Allegation IV., Record, p. 10.

This Honorable Court is bound by the pleadings.

The facts reasonably presumed from the pleadings and the evidence are:

That in 1897 Franklin street was between Block L and Gastineau Channel and that by the acts of nature it washed away until at the commencement of this suit Franklin street had been absorbed by the waters of Gastineau Channel. Would not then the owner of Block L be littoral proprietor? Somebody must be, and who else could be except the appellant?

According to the pleadings has plaintiff been guilty of laches?

She had no littoral rights until her premises abutted on tide water.

During none of the time from February 20, 1897, until the day this action was commenced had she any littoral rights, and any act of hers against the expenditure of moneys on Uncle Sam's tide land by this defendant or its lessor would have been the act of a meddlesome person.

Allegation III. of appellee's affirmative defense is:

"That the plaintiff during all of said years since the 20th of February, 1897, has stood by and allowed improvements of considerable value from time to time to be placed upon said premises; allowed the rents from the said premises to be collected by the Pacific Coast Company and its predecessors in interest, without objection, claim or notice of equity on her part to the said premises."

Record, p. 13.

Appellant's deed to Block L was of record ever since October 4, 1898.

Record, p. 47.

And she asserted her rights as a littoral proprietor as soon as, by the pleadings, she had any such rights. She could have maintained no action unless she was a littoral proprietor. And if she stood by and saw these improvements go up while she was a littoral proprietor why did not appellee so allege in its pleadings?

Appellant herein refers to p. 21 of her brief.

On p. 9 of its brief appellee says that it was not proven that the "People's Wharf Company" was a corporation it does not deem material." Appellant does, and submits the authority cited in her brief to show at least it had no authority as a corporation to contract.

Appellant's Brief, pp. 26, 27 and 28.

The laws of Oregon extended to Alaska only in so far as they were applicable.

The law of Oregon as to formation of corporations at the time the men composing the People's Wharf Company attempted to form that pretended corporation were as follows:

"Whenever three or more persons shall desire to incorporate themselves for the purpose of engaging in any lawful enterprise, business pursuit or occupation, they may do so in the manner prescribed in this act."

Sec. 3217, Hill's Annotated Laws of Oregon.

The next section provided they shall make and subscribe written articles of corporation in triplicate, one to be filed with the secretary of state, one to be

filed with the county clerk of the county wherein the principal business of said corporation is, and the third filed with themselves.

Sec. 3218, Hill's Annotated Laws of Oregon.

"The principal business of said company shall be carried on in the town of Juneau, District of Alaska, aforesaid."

Record, p. 60.

This Honorable Court will take judicial notice that the laws of Oregon were not applicable to Alaska as to formation of corporations and that these men did not comply with all the formalities of law.

On p. 9 appellee well says: "It is immaterial whether it was John Smith alone who was so doing, or a number of persons who, in compliance with all the formalities of law, had organized a de jure corporation."

That is law, and had the formers of that pretended corporation made compliance with all the formalities of law appellant would not now be questioning its existence.

"Estoppel cannot operate to create a corporation, even for the purpose of a private litigation, where there is no law under which such a corporation could have been organized."

Snyder vs. Studebaker, 81 Am. Dec. 415.

Heaston vs. Cincinnati, etc., R. Co., 79 Am. Dec. 430.

Evansville, etc., R. Co. vs. Evansville, 15 Ind. 395.

Brown vs. Killan, 11 Ind. 449.

Eaton vs. Walker, 6 L. R. A. 102.

Merchants, etc., Bank vs. Stone, 38 Mich. 779.

10 Cyc., p. 247.

"An intended corporation cannot become such de jure where an essential step required by statute as a prerequisite be omitted, as a failure to file articles of incorporation or filing them in the wrong county."

Capps vs. Hastings Prospecting Co., 24 L. R. A. 259.

Martin vs. Deetz, 102 Cal. 55.

10 Cyc., p. 252.

A corporation becomes de facto on the existence of a charter or some law under which a corporation with the powers assumed might lawfully be created."

10 Cyc., supra, and authorities.

"A corporation is a creature of, and created by the law."

People vs. Golden Gate Lodge No. 6, 128 Cal. 257.

"A corporation is a creation of the statute."

People vs. Dederick, 55 N. E. 927.

"A corporation is an artificial person, and in this country is solely the creature of the law-making power."

Ex parte Selma & G. R. Co., 6 Am. Rep. 722.

Words & Phrases, 1611.

Ergo! No law, no corporation.

On p. 10 appellee urges: "And whether or not the persons who so assumed to be a corporation had a right so to do can only be questioned by the state."

That is not the law where there is neither de jure,